

# No.16-55690

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**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

**2MANGAS, INC.**

**Petitioner/Appellant,**

**v.**

**NATIONAL LABOR RELATIONS BOARD,**

**Respondent/Appellee.**

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**OPPOSITION TO EMERGENCY  
MOTION FOR STAY UNDER CIRCUIT RULE 27-3**

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## **I. INTRODUCTION**

In its Emergency Motion for a Stay, Respondent-Appellant 2Mangas, Inc. (“2Mangas”) makes the same arguments it made below, asserting that further delays in its document production will not matter in the underlying administrative proceeding, and that Petitioner-Appellee the National Labor Relations Board (the “NLRB” or “Board”) is not really harmed by further delay. To the contrary, both the Administrative Law Judge in the underlying proceeding and the District Court below soundly rejected these arguments, and, in rejecting 2Mangas’s request for a stay pending appeal, the District Court unambiguously found that 2Mangas’s previous delays had prejudiced the NLRB and that further delay “would only exacerbate this prejudice to the NLRB.” (Docket No. 8-2 at 2.)

Further delaying production of responsive documents and electronically stored information (ESI) would allow 2Mangas to evade its production obligations in the middle of the trial in the underlying administrative proceeding below. The NLRB respectfully requests that this Court end the cycle of delays and deny 2Mangas’s Emergency Motion for a Stay.

## **II. BACKGROUND**

The underlying administrative case involves more than just 2Mangas. It arises in the context of nationwide litigation being conducted by the Board’s General Counsel alleging a joint-employer relationship between McDonald’s USA,

LLC (“McDonald’s USA”)<sup>1</sup> and a number of its franchisees, including 2Mangas. Trial in the underlying administrative proceeding below began on March 10 in New York City, and there has already been 20 days of testimony during which eight witnesses employed (or previously employed) by McDonald’s USA have testified. (Sanders-Clark Appendix at 976).<sup>2</sup> Testimony will resume on May 23, and granting 2Mangas’s Emergency Stay motion would force the NLRB General Counsel to proceed without relevant documents he is legally entitled to obtain and use, as both the Administrative Law Judge and the District Court have ruled.

**A. In the underlying administrative proceeding, the NLRB General Counsel is introducing evidence about the relationship between McDonald’s USA and McDonald’s franchisees like 2Mangas**

Beginning in late November 2012, a nationwide fast-food workers campaign involving employees working for McDonald’s USA and a number of its franchisees commenced. As a result of that campaign, workers filed numerous unfair labor practice charges against McDonald’s USA and various franchisees, including 2Mangas, alleging violations of the National Labor Relations Act, 29 U.S.C. §§ 151, *et seq.* (“the Act”). Those charges also allege that McDonald’s USA is a joint employer along with each of the charged franchisees, including 2Mangas.

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<sup>1</sup> McDonald’s USA is one of the nation’s largest employers, and McDonald’s USA restaurants in the United States employ approximately 750,000 workers.

<sup>2</sup> For ease of reference, each of the Board’s oppositions will refer to the appendix filed in the Sanders-Clark appeal, Case No. 16-55692.

After conducting administrative investigations, the Board's General Counsel found merit to many of these charges, which allege that McDonald's USA and certain franchisees violated the Act by, *inter alia*, discriminatory discipline, reductions in hours, discharges, and other coercive conduct directed at employees in response to union and protected concerted activities, including: threats, surveillance, interrogations, promises of benefit, and overbroad restrictions on communicating with union representatives or other employees about unions and the employees' terms and conditions of employment. The Board's General Counsel also concluded that McDonald's USA, through its franchise relationship and its use of tools, resources, and technology, engages in sufficient control over its franchisees' operations, beyond protection of its brand, to make it a putative joint employer with the franchisees at issue, thus sharing liability for violations of the Act. The Board's General Counsel further found support for joint-employer status based on McDonald's USA's nationwide response to franchise employee activities while participating in fast-food worker protests to improve their wages and working conditions.

In December 2014 and February 2015, on behalf of the Board's General Counsel, the Board's regional offices in New York, Philadelphia, Chicago, Indianapolis, Los Angeles, and San Francisco issued seven separate unfair labor practice complaints based upon 75 charges filed against McDonald's USA and 29

of its franchisees in addition to one corporate-owned store. The complaints allege that McDonald's USA is a joint employer with each of the 29 charged franchisees, including 2Mangas. All of the complaints were transferred to be handled primarily by the Board's regional office in Manhattan, and were consolidated for trial before Administrative Law Judge Lauren Esposito ("the ALJ"). After the complaints were consolidated for administrative purposes, on March 3, 2015, the ALJ issued a Case Management Order directing that the hearing would begin in New York City, move to Chicago, and conclude in Los Angeles. (Attached as NLRB Ex. 1, at 7-8.) The ALJ's order further directed that at the start of the trial in New York, the Board's General Counsel "will present all evidence with respect to each specific franchisee in turn, *including evidence pertinent to the joint employer issue* and evidence relevant [to] the alleged violations." (*Id.* (emphasis added).) In March 2016, the parties agreed to modify the Case Management Order. Paragraph 2 of the stipulation provides:

As previously ordered and notwithstanding the foregoing, the General Counsel and the Charging Parties will present all joint employer allegation-related evidence they contend is applicable *on a corporate or nationwide basis* in New York, during the phases of the trial there.

(Sanders-Clark Appendix at 586 (emphasis added).)

**B. The District Court enforced the NLRB's Subpoena**

It has been over fifteen months since February 2015, when the NLRB General Counsel issued a subpoena to 2Mangas seeking, *inter alia*, the production of documents and ESI relevant the General Counsel's allegation that 2Mangas is a joint employer along with McDonald's USA (the "Subpoena"). Paragraph 26 of the Subpoena provides:

This subpoena does not seek documents or communications (or portions of such matters) that Respondent concludes must be withheld because they are covered by the attorney-client privilege or work-product doctrine. For any document withheld on a claim of privilege and/or under the work-product doctrine, identify the date, author, recipients, title, general nature of the document of communication, privilege claimed, and the factual or other basis for Respondent's belief that all the necessary elements for the privilege or protection applies. If any of the requested documents in whole or in part are not produced because they are deemed subject to such protections, the description of the nature of the document not produced or disclosed should be such that, without revealing information itself privileged or protected, will enable the assessment of the applicability of the privilege or protection.

(Sanders-Clark Appendix at 61-62.)

In response to the Subpoena, 2Mangas made boilerplate privilege and burden objections in its Petition to Revoke, which it filed on February 23, 2015, and which the ALJ denied on March 19, 2015. Over the next several months, the parties were unsuccessful in negotiating the ESI production issues, and on July 1, 2015, 2Mangas counsel indicated that it would comply with only extremely limited portions of the subpoena and conduct a narrow search for ESI. (Sanders-Clark

Appendix at 492-93.) On July 28, 2Mangas reaffirmed its refusal to comply with a majority of the subpoena requests as written. (*Id.* at 493.)

Accordingly, on September 18, 2015, the NLRB filed a subpoena enforcement action before the District Court. Upon hearing oral argument on November 16, 2015, the District Court found the Subpoena valid and ordered 2Mangas to comply with numerous provisions within 45 days, *i.e.*, by December 31, 2015. (*Id.* at 487-90.) Concurrently, the District Court ordered 2Mangas to state the basis for any privilege that 2Mangas believed justified the withholding of any documents. (*Id.* at 482.) The following week, on November 25, 2015, the District Court issued an Amended Order memorializing and supplementing its bench rulings. (*Id.* at 442-44.)

### **C. 2Mangas failed to produce a timely privilege log**

Despite the District Court's orders requiring it to produce responsive documents and ESI by December 31, 2015, 2Mangas failed to produce any privilege log whatsoever along with its productions. Nor did 2Mangas request an extension of its production deadlines or additional time to produce a privilege log. In its April 25 order, the District Court observed:

[A]t the hearing, the [District] Court asked counsel for respondent why she had not requested an extension from the [District] Court in which to submit a privilege log. Counsel for respondent had no answer for this question. Had respondent apprised the [District] Court that it was having difficulty complying with the enforcement order, the [District] Court and the parties could have found an amenable

solution, including by granting respondent additional time to produce a privilege log. Respondent's decision instead not to produce a privilege log at all deprived the parties any such opportunity and, simply put, was inexcusable.

(Attached as NLRB Ex. 2, at 12.)

Given 2Mangas's failure to produce any privilege log whatsoever, on January 20, 2016, the NLRB General Counsel sought an order from the ALJ seeking a finding that by failing to submit a privilege log, 2Mangas had waived its claim of privilege for otherwise responsive documents. On February 19, 2016, the ALJ granted this motion; that same day, 2Mangas mailed its privilege log to the NLRB General Counsel, who received it on February 22 and further protested that it was devoid of meaningful detail.<sup>3</sup> Opening statements in the underlying administrative proceeding commenced on March 10, and 2Mangas submitted a revised privilege log dated March 18, received on March 21, after witnesses had already started testifying.

On March 28, 2016, the NLRB filed a motion before the District Court seeking to hold 2Mangas in contempt for failure to comply with that court's previous production orders. Following a hearing on April 25, 2016, the District Court found that under *NLRB v. Int'l Medication Sys., Ltd.*, 640 F.2d 1110 (9th Cir.

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<sup>3</sup> 2Mangas asserts that there "is no dispute that the communications at issue are protected by the attorney-client privilege." (2Mangas Brief at 1.) To the contrary, 2Mangas's tardy production of a privilege log deprived the General Counsel of the ability to challenge substantively the appropriateness of the untimely privilege designations.

1981), the ALJ lacked authority to issue discovery sanctions in the form of a privilege-waiver finding, and declined to hold 2Mangas in contempt. But the District Court also conducted the “holistic reasonableness” analysis required by *Burlington Northern Santa Fe Railway Co. v. U.S. District Court*, 408 F.3d 1142 (9th Cir. 2005), and found “that [2Mangas’s] roughly year-long delay in producing an adequate privilege log is inexcusable,” and accordingly found that by this delay, 2Mangas had waived its ability to assert the attorney-client privilege.

The District Court’s April 25 Order therefore required 2Mangas to produce all documents responsive to the Subpoena, regardless of any assertion of privilege, by no later than May 8. The parties submitted a joint request, which the District Court granted, to extend 2Mangas’s production deadline to Monday, May 16.

In an order dated Tuesday, May 10, and entered on the afternoon of Thursday, May 12, the District Court denied 2Mangas’s *ex parte* application to stay the April 25 Order pending the resolution of 2Mangas’s appeal. The District Court declined to grant a stay because 2Mangas had failed to make a showing that it was likely to succeed on the merits of its appeal, particularly in light of 2Mangas’s delay and “wholly inadequate” explanations of counsel for the failure to produce a privilege log. (Docket No. 8-2 at 2.) The District Court further found that granting the requested stay would “exacerbate [the] prejudice” the NLRB

faced, given that the underlying administrative hearing “has now been underway for two months.” (*Id.*)

### **III. ARGUMENT**

In determining whether to grant a stay pending appeal when the government is the opposing party, the Court will evaluate three factors:

- (1) whether the stay applicant has made a strong showing that it is likely to succeed on the merits;
- (2) whether the applicant will be irreparably injured absent a stay; and
- (3) where the public interest lies.

*Leiva-Perez v. Holder*, 640 F.3d 962, 964, 970 (9th Cir. 2011); *see also Nken v. Holder*, 556 U.S. 418, 435 (2009) (noting that the third and fourth traditional stay factors merge when the government is the opposing party); *Lair v. Bullock*, 697 F.3d 1200, 1204, 1214-15 (9th Cir. 2012). The issuance of a stay pending appeal is “not a matter of right, even if irreparable injury might otherwise result.” *Nken*, 556 U.S. at 433 (quoting *Virginian Ry. Co. v. United States*, 272 U.S. 658, 672 (1926)). It is within the discretion of this Court to issue a stay, and 2Mangas bears the burden of demonstrating to the Court that the circumstances justify the exercise of such discretion. *Nken*, 556 U.S. at 433-34; *Lair*, 697 F.3d at 1203. To justify a stay in this case, 2Mangas must show that irreparable harm is probable *and* either: “(a) a strong likelihood of success on the merits and that the public interest does not weigh heavily against a stay; or (b) a substantial case on the merits and that the

balance of the hardships tips sharply in [2Mangas's] favor.” *Leiva-Perez*, 640 F.3d at 970.

As acknowledged by the District Court in its April 25 Order, the Board has already “suffered prejudice as a result of respondent’s delay in timely producing a privilege log.” (NLRB Ex. 2, at 12.)<sup>4</sup> The Board continues to suffer prejudice each day that 2Mangas fails to produce the remaining responsive documents—two months into the *ongoing* unfair labor practice hearing for which the documents are needed—and such prejudice would be dramatically compounded by the issuance of a stay pending appeal. Because 2Mangas has failed to affirmatively demonstrate a likelihood of success on the merits or a sufficient probability of irreparable harm, and because the Board’s litigation and the public interest would be substantially harmed by further delay in 2Mangas’s production of the responsive documents, the Court should deny 2Mangas’s motion.

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<sup>4</sup> Because the Sanders-Clark Appendix does not include the last page of the April 25 Order, for ease of reference, the entire order is attached herein as Exhibit 2.

### **A. 2Mangas Is Unlikely to Succeed on the Merits**

In order to justify a stay pending appeal, 2Mangas must first demonstrate that, at a minimum, it has a “substantial case on the merits.” *Leiva-Perez*, 640 F.3d at 966. It is not enough for 2Mangas to show that there is a “mere possibility of relief.” *Nken*, 556 U.S. at 434.

#### **1. 2Mangas is unlikely to succeed because the District Court did not abuse its discretion in finding that as a result of 2Mangas’s inexcusable delay, it has waived the attorney-client privilege**

In finding that 2Mangas’s delay in producing a timely privilege log was inexcusable, and by such delay 2Mangas had waived its ability to assert the attorney-client privilege, the District Court applied the framework established by this Court in *Burlington Northern Santa Fe Railway Co. v. U.S. District Court*, 408 F.3d 1142, 1149 (9th Cir. 2005), for evaluating when a party has waived its right to claim privilege based on undue delay in adequately asserting privilege. When a party engages in undue delay in properly asserting an alleged privilege during discovery, that party waives its right to claim privilege: “[T]he effect of untimeliness in properly asserting privilege is to waive or otherwise abandon the privilege.” *Burlington Northern*, 408 F.3d at 1147.

In *Burlington Northern* itself, the Court reviewed a district court’s finding of waiver by way of a petition for a writ of mandamus, and the Court thus reviewed the district court’s finding for clear error as a matter of law. *Id.* at 1146. However,

the *Burlington Northern* Court’s deferential review of the district court’s finding was also “informed by the general principle, not unique to the mandamus context, that ‘[d]istrict courts have wide latitude in controlling discovery.’” *Id.* at 1146-47 (quoting *United States ex rel. Aflatooni v. Kitsap Physicians Serv.*, 314 F.3d 995, 1000 (9th Cir. 2002)). On appeal, this Court generally reviews a district court’s imposition of discovery sanctions under an abuse of discretion standard.

*Jorgensen v. Cassidy*, 320 F.3d 906, 912 (9th Cir. 2003); *see Computer Task Grp., Inc. v. Brothby*, 364 F.3d 1112, 1115 (9th Cir. 2004) (applying abuse of discretion standard in reviewing imposition of sanction for obstructing discovery); *cf. Lambright v. Ryan*, 698 F.3d 808, 822 (9th Cir. 2012) (applying abuse of discretion standard in reviewing district court’s modification of protective order and district court’s finding that privilege had not been adequately raised).

Assuming that abuse of discretion is the appropriate standard on the merits, 2Mangas has failed to articulate any reason to find that the District Court abused its discretion. Moreover, while 2Mangas implicitly invites this Court to conduct a *de novo* review of the *Burlington Northern* factors, that is not the appropriate standard of review. 2Mangas’s citation to cases involving a district court’s decision to grant or deny enforcement of an administrative subpoena—*NLRB v. N. Bay Plumbing, Inc.*, 102 F.3d 1005, 1007 (9th Cir. 1996); *Reich v. Mont. Sulphur & Chem. Co.*, 32 F.3d 440, 443 (9th Cir. 1994)—are inapposite. Here, the District

Court granted the Board’s application for subpoena enforcement in November 2015, and 2Mangas failed to appeal that decision. The only issue on appeal before this Court is the District Court’s subsequent finding in its April 25 Order that 2Mangas waived its right to claim privilege.<sup>5</sup> In any event, even under a *de novo* standard of review, 2Mangas has not demonstrated a “substantial case on the merits.”

The District Court reasonably applied the *Burlington Northern* framework and the holistic analysis required by this Court. In order to prevail under the abuse of discretion standard of review, assuming that *Burlington Northern* is the correct legal standard, 2Mangas will need to demonstrate to this Court that the District Court’s analysis was: “(1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record.” *United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc) (citation omitted)

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<sup>5</sup> It is true that in other contexts this Court reviews “[w]hether or not a given communication or information is protected by the attorney-client privilege” as a “mixed question of law and fact [that] is subject to de novo review.” *Dole v. Milonas*, 889 F.2d 885, 888-89 (9th Cir. 1989). However, this case does not involve a determination of whether 2Mangas substantively waived its privilege—for example, by improperly disclosing privileged information—or whether 2Mangas was properly claiming privilege as applied to a specific document. Instead, the District Court imposed what is in essence a discovery sanction for 2Mangas’s inexplicable failure to timely claim privilege (derived in part from the Federal Rules of Civil Procedure, as discussed in *Burlington Northern*). The sole question before this Court will be whether the District Court properly applied the established *Burlington Northern* framework, which warrants, at a minimum, review for an abuse of discretion.

(outlining abuse of discretion standard as applied to a district court’s application of the “correct legal standard”). 2Mangas has not even attempted to do so. Even considering the *Burlington Northern* factors *de novo*, 2Mangas has failed to justify overturning the District Court’s finding of waiver. 2Mangas merely reiterates the same arguments that were rejected by the District Court—and, in the unfair labor practice proceeding, by the Administrative Law Judge—and for all of the reasons outlined in the District Court’s opinion below, 2Mangas’s arguments are unavailing. (NLRB Ex. 2, at 9-14.)

**2. 2Mangas is unlikely to succeed in its attempt to re-write well-established practices involving privilege logs**

As it did before the District Court, 2Mangas continues to argue that its boilerplate assertion of privilege in February 2015 somehow excuses its failure to produce a timely privilege log. Likewise, 2Mangas invokes a circular argument when it asserts that the Subpoena’s definitions, stating that the Subpoena is not seeking the production of privilege documents or ESI, somehow relieved 2Mangas of the obligation to produce a privilege log; those very same definitions called for the production of a privilege log. Finally, 2Mangas cites no authority to support its assertion that the redaction of privileged material in its ESI production satisfied its obligations, despite the lack of any privilege log being produced until months after the production deadline ordered by the District Court and nearly a year after the Subpoena issued. Simply put, in attempting to re-write longstanding practices

regarding claiming privilege and submitting privilege logs, 2Mangas has failed to show it has a “substantial case on the merits.”

In this regard, Section II-B of 2Mangas’s argument section is puzzling. 2Mangas apparently suggests that because resolving privilege claims is the exclusive role of district courts, the District Court could not rule on privilege claims when the Board’s Subpoena excludes privileged documents from its scope. Consistent with long-standing practice, the same paragraph of the Subpoena that stated that it did not seek the production of privileged documents also required asked that privilege claims be enumerated on a log so that they could be resolved—by the parties, the ALJ or, if necessary, the District Court. (Sanders-Clark Appendix at 61-62.)

After conducting the “holistic reasonableness” analysis required by *Burlington Northern*, the District Court found that by its “inexcusable” delay in producing a privilege log, 2Mangas had waived its ability to claim privilege. 2Mangas bases its argument on the premise that the District Court’s authority to levy a sanction after conducting the *Burlington Northern* analysis is somehow limited by the Board’s statement in the Subpoena’s instructions that it did not seek the production of privileged documents. Yet the Board’s instructions required the preparation and production of a privilege log, and this obligation was acknowledged numerous times by the ALJ and, as the District Court observed, was

“implicit” in the District Court’s production order. (NLRB Ex. 2, at 11.) At no time before the privilege-waiver filings did 2Mangas suggest that it was relying on its strained interpretation of the Subpoena instructions to excuse its lack of a privilege log.

Moreover, 2Mangas’s argument fundamentally misconstrues the District Court’s finding. While it is possible that the documents at issue *would have been* privileged had 2Mangas adequately asserted its claims of privilege in a timely manner, the District Court reasonably applied the *Burlington Northern* framework and concluded that 2Mangas had waived its right to claim privilege, and the documents are thus *not* privileged unless this Court overrules the District Court’s reasonable finding. And contrary to 2Mangas’s attempted characterization of the April 25 Order, the District Court did not find that privilege was waived simply because 2Mangas “failed to contemporaneously produce a privilege log with its 63,000-page document production.” (2Mangas Brief at 1.) The District Court instead applied the holistic reasonableness analysis and the numerous factors outlined by this Court in *Burlington Northern*, and concluded that 2Mangas’s delay of nearly *one year* in producing any privilege log whatsoever constituted a waiver of its privilege claims.

Next, 2Mangas attempts to take refuge in its assertion that a waiver of privilege is only an appropriate sanction in the context of “extreme malfeasance.”

(Br. 17). However, such a standard evidently appears nowhere in Ninth Circuit case law—nor even in the unreported district court decision cited by 2Mangas, *Khasin v. Hershey Co.*, Case No. 5:12-cv-01862-EJD-PSG, 2014 WL 690278 (N.D. Cal. Feb. 21, 2014). The waiver of privilege due to its untimely assertion is instead governed by the multi-factor framework outlined in *Burlington Northern*. *See also Khasin*, 2014 WL 690278, at \*2.

The District Court found 2Mangas’s conduct “inexcusable,” and its explanations for its conduct “wholly inadequate.” In making these findings, the District Court rejected 2Mangas’s strained *post-hoc* interpretation of the Subpoena’s instructions. In short, 2Mangas has failed to demonstrate a likelihood of success on the merits before this Court.

**B. In the Absence of a Stay, 2Mangas Will Not Suffer Irreparable Harm**

Parties seeking a stay must also demonstrate that irreparable harm is more than a mere “possibility,” but is instead “probable” absent a stay. *Leiva-Perez*, 640 F.3d at 968; *see Nken*, 556 U.S. at 434-35 (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008)). In analyzing whether there is a probability of irreparable harm, the Court will focus on “the individualized nature of irreparable harm and not whether it is ‘categorically irreparable.’” *Lair*, 697 F.3d at 1214 (citation omitted).

Although the District Court’s April 25 Order requires the production of certain documents that 2Mangas continues to claim are privileged, 2Mangas has not demonstrated a sufficient probability that its interests will be irreparably harmed. The Supreme Court has recognized that “postjudgment appeals generally suffice to protect the rights of litigants and ensure the vitality of the attorney-client privilege,” and that appellate courts possess the authority to remedy improper disclosures of privileged information. *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 109 (2009). 2Mangas has failed to make any showing as to why this Court, on review of the District Court’s April 25 Order—or a different court of appeals, on review of a final Board order in the unfair labor practice proceeding, pursuant to 29 U.S.C. § 160(f)—would be powerless to remedy any potential harm flowing from the production of the documents encompassed by the District Court’s order.<sup>6</sup>

While attorney-client privilege is undeniably “important in the abstract,” *Mohawk Indus.*, 558 U.S. at 109, that does not mean that 2Mangas has articulated a sufficient showing of probable irreparable harm on the specific facts of this case. This Court has noted that its stay analysis should not simply focus on harms that are claimed to be “categorically irreparable.” *Lair*, 697 F.3d at 1214. Indeed, an

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<sup>6</sup> For this reason, it is not true that 2Mangas is being forced to disobey the District Court’s order and risk a finding of contempt in order to “preserve appellate review of the privilege assertion.” (2Mangas Brief at 21). Moreover, the District Court’s finding that 2Mangas waived its right to claim privilege is currently *on appeal* before this Court. And obedience to the District Court’s order will not moot the appeal. See *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 13 (1992).

“individualized” inquiry is necessary, *id.*, and the improper disclosure of privileged documents is clearly not *per se* irreparable. *Cf. Rubin v. United States*, 524 U.S. 1301, 1301-02 (1998) (Rehnquist, C.J.) (denying stay pending certiorari despite the potentially improper disclosure of privileged information that would allegedly be “lost forever”). 2Mangas has not articulated any showing of individualized irreparable harm other than the inherent sanctity of the attorney-client relationship. Yet the District Court’s April 25 Order is limited to a defined set of existing documents, rather than the continuing privileged nature of 2Mangas’s attorney-client relationship. 2Mangas identifies absolutely no specific harm that it will suffer as a result of the disclosure of the defined set of documents at issue in this case.

In addition, 2Mangas’s citations regarding the irreparability of a potentially improper disclosure of privileged information are, with one exception, all decisions that predate the Supreme Court’s opinion in *Mohawk Industries*, 558 U.S. 100. Indeed, in the only post-*Mohawk* case cited by 2Mangas, *Hernandez v. Tanninen*, 604 F.3d 1095 (9th Cir. 2010), this Court felt compelled to distinguish *Mohawk Industries* by finding that the privilege waiver at issue in *Hernandez* fit within the “particularly novel or injurious” exception identified by the Supreme Court in *Mohawk Industries*. *Hernandez*, 604 F.3d at 1101. The waiver at issue in *Hernandez* involved an expansive blanket waiver of attorney-client and work

product privileges, and was thus “particularly injurious,” warranting interlocutory review. *Id.* In contrast, there is nothing novel or particularly injurious about the potentially-improper disclosure of the limited number of documents at issue in this case—and, whatever the merits of the earlier court of appeals decisions cited by 2Mangas, the Supreme Court has since definitely spoken in finding that postjudgment appellate review is typically an adequate remedy for improper disclosures. *Mohawk Industries*, 558 U.S. at 109.<sup>7</sup>

Moreover, the District Court ordered the production of the documents at issue in this case is because 2Mangas engaged in “inexcusable delay” by waiting nearly a year before producing a privilege log to protect its claims of privilege. The weight that should be given to 2Mangas’s invocation of its attorney-client privilege should take into account the fact that, as the District Court found, 2Mangas waived that privilege by deliberately failing to properly assert it for more than a year after the Board’s subpoena issued. 2Mangas will only suffer harm if this Court reverses the District Court’s order, which is less compelling and certainly not “probable” when both the District Court and the Administrative Law

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<sup>7</sup> Thus, for example, in *Admiral Ins. Co. v. U.S. District Court*, 881 F.2d 1486, 1491 (9th Cir. 1989), the Court was relying on the proposition that “an appeal after disclosure of the privileged communication is an inadequate remedy,” *id.* (citation omitted), which is of questionable continuing validity in light of the Supreme Court’s reasoning in *Mohawk Industries*. Likewise, the simple fact that “disclosure cannot be undone, by appeal or otherwise,” *Barton v. U.S. District Court*, 410 F.3d 1104, 1109 (9th Cir. 2005), does not establish “irreparable harm,” given the Supreme Court’s views on the adequacy of postjudgment appellate review.

Judge have already performed a holistic analysis of the facts and found that privilege was waived. *Cf. In re North Plaza, LLC*, 395 B.R. 113, 126 (S.D. Cal. July 25, 2008) (finding mere possibility of irreparable harm insufficient to justify stay, and noting that “the argument that potentially privileged documents might be disclosed is less powerful when one ruling has already found the privilege inapplicable.”).

Even assuming, *arguendo*, that 2Mangas could articulate a claim of individualized irreparable harm, the balance of the enumerated stay factors nonetheless weighs against a stay in this case. As this Court has noted, in upholding a “sliding scale” approach to evaluating stay requests, a showing of irreparable harm is a “necessary but not sufficient condition for the exercise of judicial discretion to issue a stay.” *Leiva-Perez*, 640 F.3d at 965; *see Nken*, 556 U.S. at 433. Under the Court’s sliding scale approach, “the required degree of irreparable harm increases as the probability of success decreases.” *Humane Soc’y of U.S. v. Gutierrez*, 523 F.3d 990, 991 (9th Cir. 2008). Other courts have suggested that, in the absence of probable success on the merits, it is not enough even that “the failure to obtain a stay will be ‘a disaster’ for the stay movant,” because “equity jurisdiction exists only to remedy legal wrongs; thus, without some showing of a probable right, there is no basis for invoking it.” *In re Revel AC, Inc.*, 802 F.3d 558, 568 (3d Cir. 2015) (quoting *Roland Mach. Co. v. Dresser*

*Indus.*, 749 F.2d 380, 386 (7th Cir. 1984)). Since 2Mangas is very unlikely to succeed on the merits, as discussed above, any showing of irreparable harm is simply inadequate to justify a stay in this case—particularly given the substantial harm to the public interest, as discussed below.

**C. The Substantial Injury to the Public Interest Resulting from 2Mangas’s Refusal to Comply with the District Court’s Order Is Immediate and Ongoing**

To justify the issuance of a stay, 2Mangas must also demonstrate, at a minimum, that “the balance of the hardships tips sharply in [its] favor.” *Leiva-Perez*, 640 F.3d at 970. Even if 2Mangas could demonstrate a “strong likelihood of success on the merits,” it would still need to show that “the public interest does not weigh heavily against a stay.” *Id.* In balancing the enumerated stay factors and determining whether to issue a stay pending appeal, “the relative hardships to the parties provid[e] the critical element.” *Id.* (quoting *Abbassi v. INS*, 143 F.3d 513, 514 (9th Cir. 1998)). 2Mangas has failed to justify a stay pending appeal in this case, because it is clear that the balance of the hardships and the potential prejudice to the Board and the public interest weigh overwhelmingly against a stay.

In evaluating the traditional stay factors when the government is the party opposing the request for stay, the public interest and the injury to the opposing party merge. *Nken*, 556 U.S. at 435; *Leiva-Perez*, 640 F.3d at 970. In carrying out its statutory duty to investigate unfair labor practices, the Board acts in the public

interest. *See NLRB v. Vibra Screw, Inc.*, 904 F.2d 874, 876 (3d Cir. 1990); *Singer Co. v. NLRB*, 429 F.2d 172, 178 (8th Cir. 1980). The true measure of the harm caused by further delayed production is not its impact on the Board as an institution, but on the Board as the agency charged with protecting the public's interest in exercising the rights guaranteed by the Act. *See Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 192-95 (1941). The Board, through its General Counsel, is currently in the middle of the trial of a nationwide unfair labor practice case involving McDonald's USA and a number of franchisees, including 2Mangas. The General Counsel's ability to present evidence regarding the alleged joint-employer relationship between McDonald's USA and charged franchisees has been undercut, and continues to be undercut, by 2Mangas's failure to provide all documents and ESI responsive to a valid administrative subpoena issued over a year ago.

In its Emergency Motion for Stay, 2Mangas asserts the same timing arguments that were rejected by both the ALJ and the District Court— that the portion of the trial relating to 2Mangas is not occurring any time soon. Here, eight witnesses have already testified over 20 days, with trial set to resume on May 23. (Sanders-Clark Appendix at 976-77). As the District Court observed in denying a stay of its order below: “[A]s a result of respondent’s delays, the NLRB has been forced to proceed without many relevant documents. Granting respondent’s requested stay would only exacerbate this prejudice to the NLRB.” (Docket No. 8-

2, at 2.) Pursuant to the Administrative Law Judge's Case Management Order (NLRB Ex. 1, at 7-8), the General Counsel's presentation of evidence begins with evidence regarding the joint-employer relationship between McDonald's and the charged franchisees. (See also March 2016 Stipulation, Sanders-Clark Appendix at 586 (requiring General Counsel and Charging Party to present, in New York City, "evidence they contend is applicable on a corporate or nationwide basis").)

On April 27 and 28, 2016, counsel for the General Counsel examined Tracie Vargas, who served as the McDonald's USA Southern California Regional HR Director during a portion of the relevant time period in the underlying administrative case. (Sanders-Clark Appendix at 977). During Ms. Vargas' examination, counsel for the General Counsel used many documents produced by the Los Angeles franchisees, a group that includes 2Mangas. (*Id.*). In total, in the underlying administrative proceeding, the General Counsel has presented and the ALJ has admitted 43 exhibits containing documents produced by 2Mangas, and Sanders-Clark & Co. and D. Bailey Management Co., the two other Los Angeles franchisees who are the subject of similar actions before this Court. (*Id.*). The General Counsel intends to call at least seven other McDonald's USA Southern California Region employees who were employed during a portion of the relevant time period in this case, and these individuals will testify before the "Los Angeles phase" of the underlying administrative proceeding, *id.*, and counsel for the

General Counsel obviously will use documents produced by the charged Los Angeles franchisees as part of this examination.

Accordingly, the Board's injury from 2Mangas's failure to produce responsive documents is immediate and ongoing. As the Board acts in the public interest, the injury to the public interest is also immediate and ongoing. By comparison, 2Mangas asserts no public interest to support a stay. Rather, 2Mangas relies only on its own private interest in avoiding disclosure of certain company information. Any suggestion that the public interest favors a *per se* prohibition on any potentially improper disclosure of privileged documents is obviously undercut by the Supreme Court's reasoning in *Mohawk Industries*. As the Court noted, appellate review is more than sufficient to "ensure the vitality of the attorney-client privilege." *Mohawk Indus.*, 558 U.S. at 109. The balance of the hardships in this case overwhelmingly favor the Board, which is being obstructed from properly investigating the unfair labor practices in the underlying hearing by 2Mangas's continued delay. The Court should not compound the prejudice suffered by the Board and the public interest by granting a stay pending what is likely to be a lengthy appeal.

### III. CONCLUSION

For all the foregoing reasons, the NLRB respectfully requests that 2Mangas's Emergency Motion for a Stay be denied.

Dated this 13<sup>th</sup> day of May, 2016,

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